RECORD AND BRIEFS

Nos. 16-961 and 16-1017

In the Supreme Court of the United States

NICOLE A. DALMAZZI, PETITIONER

v.

UNITED STATES OF AMERICA

LAITH G. COX, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
DANA J. BOENTE
Acting Assistant Attorney General
JOSEPH F. PALMER
DANIELLE S. TARIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

Library of Congress

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Armed Forces erred in denying discretionary review of petitioners' challenges to the continued service of military judges on service courts of criminal appeals after those judges were appointed by the President to the United States Court of Military Commission Review (USCMCR).

2. Whether 10 U.S.C. 973(b), which provides that, except as otherwise authorized by law, a military officer may not hold a "civil office" that requires a presidential appointment with Senate confirmation, prohibits a military officer from serving simultaneously as a presidentially appointed judge on the USCMCR and an appellate military judge on a service court of criminal appeals.

3. Whether the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, bars a military officer from serving simultaneously as a presidentially appointed judge on the USCMCR and an appellate military judge on a service court of criminal appeals.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statement 2
Argument 9
Conclusion 23

TABLE OF AUTHORITIES

Cases:

al-Nashiri, In re, 791 F.3d 71 (D.C. Cir. 2015) 4, 5, 17, 18, 20
al-Nashiri, In re, 835 F.3d 110 (D.C. Cir. 2016), petition for cert. pending, No. 16-8966 (filed Jan. 17, 2017) 5, 19
California v. *Rooney*, 483 U.S. 307 (1987) 12
Cutter v. *Wilkinson*, 544 U.S. 709 (2005) 14
Edmond v. *United States*, 520 U.S. 651 (1997) 9, 19
Freytag v. *Commissioner*, 501 U.S. 868 (1991) 22
Khadr, In re, 823 F.3d 92 (D.C. Cir. 2016) 4, 15, 16
Myers v. *United States*, 272 U.S. 52 (1926) 21, 22
Nguyen v. *United States*, 539 U.S. 69 (2003) 22
Riddle v. *Warner*, 522 F.2d 882 (9th Cir. 1975) 17
United States v. *Ortiz*, No. 16-671, 2017 WL 1382241 (Apr. 17, 2017) ..... *passim*
Weiss v. *United States*, 510 U.S. 163 (1994) 19

Constitution and statutes:

U.S. Const.:
Art. II, § 2:
Cl. 1 (Commander-in-Chief Clause) 20
Cl. 2 (Appointments Clause) ..... *passim*

Constitution and statues—Continued: Page

Art. III 12, 21
Military Commissions Act of 2009, Pub. L. No. 111-84, Div. A, Tit. XVIII, 123 Stat. 2574 4
10 U.S.C. 949b(b)(4) 16
10 U.S.C. 950f(a) 4
10 U.S.C. 950f(b) 4
10 U.S.C. 950f(b)(2) 4, 15, 16
10 U.S.C. 950f(b)(3) 4, 5
10 U.S.C. 973(b) 7, 8, 15, 17, 18
10 U.S.C. 973(b)(2) 5, 6, 12, 15, 16, 17
10 U.S.C. 973(b)(2)(A) 15
10 U.S.C. 973(b)(2)(A)(ii) 15
10 U.S.C. 973(b)(5) 9, 15, 18
10 U.S.C. 866(a) 17
10 U.S.C. 867a(a) 10, 11
28 U.S.C. 292(a) 21
28 U.S.C. 1259 11
28 U.S.C. 1259(3) 10, 11

Miscellaneous:

Black's Law Dictionary (10th ed. 2014) 12
Stephen M. Shapiro et al., *Supreme Court Practice* (10th ed. 2013) 11
William Winthrop, *Military Law and Precedents* (2d ed. 1920) 16

In the Supreme Court of the United States

No. 16-961

NICOLE A. DALMAZZI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 16-1017

LAITH G. COX, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

In No. 16-961 (*Dalmazzi*), the opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-7a) is reported at 76 M.J. 1. In No. 16-1017 (*Cox*), the orders of the United States Court of Appeals for the Armed Forces (*Cox* Pet. App. 11a, 14a, 51a, 54a, 67a, 78a) are unreported.[1]

[1] Unless otherwise noted, references to "Pet. App." refer to the appendix to the petition for a writ of certiorari in *Dalmazzi*.

JURISDICTION

In *Dalmazzi*, the judgment of the United States Court of Appeals for the Armed Forces was entered on December 15, 2016. The petition for a writ of certiorari was filed on February 1, 2017. In *Cox*, the judgments of the United States Court of Appeals for the Armed Forces were entered on December 27, 2016, and January 17, 2017. The petition for a writ of certiorari was filed on February 21, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3). As explained below, however, this Court lacks jurisdiction because it may not review "any action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review." 10 U.S.C. 867a(a); see pp. 10-11, *infra*.

STATEMENT

Petitioner Dalmazzi was convicted of using ecstasy and sentenced to one month of confinement and dismissal from the armed forces. The United States Air Force Court of Criminal Appeals (AFCCA) affirmed. Pet. App. 10a-17a.

Petitioner Cox was convicted of several offenses arising from sexual misconduct with a child and sentenced to 40 years of confinement and dismissal from the armed forces. The United States Army Court of Criminal Appeals (ACCA) affirmed in part and affirmed the sentence. *Cox* Pet. App. 1a-10a.

Petitioner Craig was convicted of attempted indecent visual recording and sentenced to a reduction in grade, 20 days of confinement, and a bad-conduct discharge. *Cox* Pet. 5-6. The ACCA affirmed. *Cox* Pet. App. 12a-13a.

Petitioner Lewis was convicted of several offenses arising from two sexual-misconduct incidents and was

sentenced to six years of confinement, a reduction in grade, and forfeiture of all pay and allowances. The AFCCA modified the findings of guilt but affirmed the sentence. *Cox* Pet. App. 16a-45a.

Petitioner Miller was convicted of two specifications of child sexual assault and sentenced to 20 months of confinement, a reduction in grade, and a bad-conduct discharge. *Cox* Pet. 7. The ACCA affirmed. *Cox* Pet. 52a-53a.

Petitioner Morchinek was convicted of misbehavior before the enemy and a drug offense and was sentenced to two months of confinement, a reduction in grade, forfeiture of pay, a bad-conduct discharge, and a reprimand. The AFCCA affirmed. *Cox* Pet. App. 55a-66a.

Petitioner O'Shaughnessy was convicted of sexual assault and abusive sexual contact and was sentenced to 60 days of confinement, a reduction in grade, forfeiture of all pay and allowances, and a bad-conduct discharge. The AFCCA affirmed. *Cox* Pet. App. 68a-77a.

The United States Court of Appeals for the Armed Forces (CAAF) granted a petition for discretionary review in each case, but later vacated its orders granting review and denied the petitions. Pet. App. 1a-7a; *Cox* Pet. App. 11a, 14a, 51a, 54a, 67a, 78a.

1. Petitioners are seven military servicemembers who were convicted before military courts-martial and whose convictions were affirmed by the ACCA or the AFCCA. Petitioners contend that they are entitled to new hearings before the ACCA or the AFCCA because the panels that acted on their appeals included one or more military judges who were later appointed to the United States Court of Military Commission Review (USCMCR) by the President with the advice and consent of the Senate.

a. Congress established the USCMCR in the Military Commissions Act of 2009 (MCA), Pub. L. No. 109-84, Div. A, Tit. XVIII, 123 Stat. 2574. The USCMCR is an intermediate appellate tribunal for military commissions, performing a function analogous to the one served for courts-martial by the ACCA, the AFCCA, and the other service courts of criminal appeals. See 10 U.S.C. 950f(a). The USCMCR's decisions are reviewed by the D.C. Circuit. See *In re al-Nashiri*, 791 F.3d 71, 74-75 (D.C. Cir. 2015).

The MCA authorizes both military officers and civilians to serve as judges on the USCMCR. 10 U.S.C. 950f(b). The Secretary of Defense may "assign persons who are appellate military judges to be judges on the [USCMCR]." 10 U.S.C. 950f(b)(2). A person so assigned must be a commissioned officer in the armed forces. *Ibid.* In addition, the President may "appoint, by and with the advice and consent of the Senate, additional judges," who are not required to be military officers. 10 U.S.C. 950f(b)(3); see *Nashiri*, 791 F.3d at 74-75.

The USCMCR's jurisdiction is limited to reviewing military commission proceedings. Because of that specialized docket, there are times when "the Court's judges may have very little to do." *In re Khadr*, 823 F.3d 92, 96 (D.C. Cir. 2016). "Consistent with that reality, the military judges who serve on the [USCMCR] also continue to serve on the military appeals courts from which they are drawn." *Ibid.*

b. In November 2014, a military commission defendant, Abd Al-Rahim Husein Muhammed al-Nashiri, petitioned the D.C. Circuit for a writ of mandamus seeking disqualification of the military USCMCR judges hearing an interlocutory appeal in his case. Among other things, Nashiri argued that appellate

military judges assigned to the USCMCR are principal officers under the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, who must be appointed by the President and confirmed by the Senate to their positions on that court. *Nashiri*, 791 F.3d at 73, 75.

The D.C. Circuit denied the petition, holding that Nashiri had not established the "clear and indisputable" right required for mandamus relief. *Nashiri*, 791 F.3d at 85-86. The D.C. Circuit did not decide whether USCMCR judges are, in fact, principal officers. *Ibid.* It also did not decide whether, if they are, the Appointments Clause requires judges previously appointed as commissioned military officers by the President with the advice and consent of the Senate to be appointed a second time specifically to the USCMCR. *Ibid.* But the D.C. Circuit observed that "the President and the Senate could decide to put to rest any Appointments Clause questions regarding the [US]CMCR's military judges" by nominating and confirming them under 10 U.S.C. 950f(b)(3). *Nashiri*, 791 F.3d at 86.

c. "The President chose to take that tack" as a prophylactic measure, without conceding that it was constitutionally required. *In re al-Nashiri*, 835 F.3d 110, 116 (D.C. Cir. 2016), petition for cert. pending, No. 16-8966 (filed Jan. 17, 2017). In April 2016, the Senate confirmed the two military judges on Nashiri's panel to the USCMCR. *Ibid.*

A few weeks later, Nashiri moved in the USCMCR to disqualify the military judges on his panel based on 10 U.S.C. 973(b)(2), which provides that, unless "otherwise authorized by law," a military officer may not hold a "civil office" that "requires an appointment by the President by and with the advice and consent of

the Senate." Nashiri argued that Section 973(b)(2) barred military officers from being appointed as USCMCR judges. Pet. App. 21a-22a. The USCMCR denied the motion, holding that military officers' service on the USCMCR is "authorized by law" because the MCA specifically authorizes military officers to be judges on that court. *Id.* at 22a. The USCMCR also held that a USCMCR judgeship is not a "civil office" covered by Section 973(b)(2) because "[d]isposition of violations of the law of war by military commissions is a classic military function." *Id.* at 23a-24a.

Nashiri sought a writ of mandamus from the D.C. Circuit based on his claim that Section 973(b)(2) bars military officers from being appointed to the USCMCR. The D.C. Circuit denied the petition in a per curiam order. *In re al-Nashiri*, No. 16-1152 Docket entry No. 1615339 (May 27, 2016).

2. Petitioners were convicted of a variety of offenses before military courts-martial. See pp. 2-3, *supra*. Petitioners appealed to the ACCA or the AFCCA, as relevant. The ACCA and the AFCCA affirmed petitioners' convictions and sentences, in some cases with modifications. Pet. App. 8a-17a; *Cox* Pet. App. 1a-10a; 12a-13a, 52a-53a, 55a-66a, 68a-77a.

In six of the seven cases, petitioners' appeals were assigned to panels that included one or more appellate military judges who were also serving on the USCMCR by virtue of an assignment by the Secretary of Defense, and who were later appointed to the USCMCR by the President. The ACCA and AFCCA issued their judgments in petitioners' cases before the

judges were appointed by the President. Pet. App. 4a-5a, 7a; *Cox* Pet. App. 11a, 14a, 51a, 54a, 67a, 78a.[2]

3. Petitioners sought discretionary review in the CAAF. The CAAF granted their petitions limited to two issues: (1) whether 10 U.S.C. 973(b) bars an appellate military judge from serving simultaneously on a service court of criminal appeals and as a presidentially appointed USCMCR judge, and (2) whether such simultaneous service violates the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2. Pet. App. 5a; see *Cox* Pet. App. 11a, 14a, 51a, 54a, 67a, 78a.

In *Dalmazzi*, the CAAF concluded that, because the relevant judge on Dalmazzi's AFCCA panel "had not yet been appointed a judge of the USCMCR at the time the judgment in [Dalmazzi's] case was released, the case [wa]s moot as to th[e] issues" on which the CAAF had granted review. Pet. App. 7a. The CAAF therefore vacated its order granting review and denied Dalmazzi's petition. *Ibid.*

In each of the other cases, the CAAF issued brief orders noting that, as in *Dalmazzi*, the relevant judges on petitioners' ACCA and AFCCA panels had not been appointed to the USCMCR until after the courts

---

[2] The seventh appeal, filed by petitioner Lewis, was decided by an AFCCA panel that did not include a judge serving on the USCMCR. *Cox* Pet. App. 15a-45a. Lewis's motion for reconsideration was assigned to a special panel that included a judge serving on the USCMCR. *Id.* at 46a-47a. The special panel denied the motion for reconsideration on May 17, 2016, eight days before the relevant judge was appointed by the President to the USCMCR. *Id.* at 48a-50a; see *id.* at 51a. On May 30, 2016, Lewis moved the special panel to reconsider its ruling, arguing that the judge's appointment to the USCMCR had disqualified him from serving on that panel. *Cox* Pet. 6. It appears that the special panel did not rule on that motion. *Ibid.*

issued their judgments in petitioners' cases. Accordingly, "in light of [its decision in] *Dalmazzi*," the CAAF vacated its orders granting review and denied the petitions for review in those cases as well. *Cox* Pet. App. 11a, 14a, 51a, 54a, 67a, 78a.

4. After denying the petitions in these cases, the CAAF rejected the statutory and constitutional challenges that petitioners had sought to raise in a different case in which the AFCCA's judgment "was issued after the President appointed [a judge on the AFCCA panel] to the USCMCR." *United States* v. *Ortiz*, No. 16-671, 2017 WL 1382241, at *2 (Apr. 17, 2017).

The CAAF first held that the defendant in *Ortiz* was not entitled to relief under 10 U.S.C. 973(b). 2017 WL 1382241, at *2-*3. The court concluded that even if the judge's position on the USCMCR were a "civil office," and even if his appointment to that office were not "otherwise authorized by law," any violation of Section 973(b) would not affect the judge's service on the AFCCA. *Id.* at *2; see *id.* at *2-*3. The court observed that although Section 973(b) prohibits military officers from holding certain civil offices, it "neither requires the retirement or discharge of a service member who occupies a prohibited civil office, nor operates to automatically effectuate such termination." *Id.* at *3. Thus, even if Section 973(b) "prohibit[ed] [the relevant judge] from holding office at the USCMCR" it would not "prohibit[] [him] from carrying out his assigned military duties at the [AF]CCA." *Ibid.* The CAAF also noted that the defendant's challenge was foreclosed by Section 973(b)'s savings clause, which provides that "[n]othing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official

duties." 10 U.S.C. 973(b)(5); see *Ortiz*, 2017 WL 1382241, at *3.

The CAAF next held that the relevant judge's simultaneous service on the AFCCA and the USCMCR did not violate the Appointments Clause. *Ortiz*, 2017 WL 1382241, at *3-*5. The court assumed without deciding that the judges of the USCMCR are principal officers. *Id.* at *5. But the court rejected the defendant's argument that it would violate the Appointments Clause for a person who serves as a principal officer on the USCMCR to serve on the AFCCA, where he is subject to supervision by other officers. *Ibid.*; cf. *Edmond* v. *United States*, 520 U.S. 651, 666 (1997) (holding that judges on a service court of criminal appeals "are 'inferior Officers' within the meaning of the [Appointments Clause]"). The court explained that the defendant's argument erroneously "presum[ed] that [the officer's] status as a principal officer on the USCMCR somehow carries over to the [AF]CCA, and invests him with authority or status not held by ordinary [AF]CCA judges." *Ortiz*, 2017 WL 1382241, at *4. In fact, the court concluded, "[t]hat is not the case." *Ibid.* The court explained that even if an officer appointed to the USCMCR is a principal officer when acting in his capacity as a judge on that court, "[w]hen [the officer] sits as a [AF]CCA judge, he is no different from any other [AF]CCA judge." *Ibid.* The court thus saw "no Appointments Clause problem" with simultaneous service. *Ibid.*

ARGUMENT

Petitioners contend (Pet. 10-18) that the CAAF erred in denying review of their statutory and constitutional claims and that this Court should decide those

claims in the first instance.[3] But this Court lacks jurisdiction over these cases because it does not have statutory authority to review the CAAF's denial of discretionary review. In any event, the issues petitioners seek to raise would not warrant review even if the Court had jurisdiction. The CAAF permissibly chose not to consider petitioners' claims because it determined that the timing of their appeals meant that those claims were not properly presented. That fact-bound, discretionary determination lacks continuing importance. And although petitioners also ask this Court to decide their underlying statutory and constitutional claims, these cases would not be appropriate vehicles in which to do so because those claims were not passed upon below. Petitioners' underlying claims also lack merit, as the CAAF held in *United States* v. *Ortiz*, No. 16-671, 2017 WL 1382241 (Apr. 17, 2017). The petitions for writs of certiorari should be denied.

1. This Court lacks jurisdiction. Decisions of the CAAF "are subject to review by [this] Court by writ of certiorari as provided in [28 U.S.C.] 1259." 10 U.S.C. 867a(a). Petitioners invoke (Pet. 1) Section 1259(3), which grants this Court jurisdiction to review "[c]ases in which the [CAAF] granted a petition for review under [10 U.S.C.] 867(a)(3)," a discretionary review provision. But Section 1259(3) does not apply here because the CAAF "vacate[d]" its orders granting review and then "denied" the petitions for review. Pet. App. 7a; *Cox* Pet. App. 11a, 14a, 51a, 54a, 67a, 78a. "Supreme Court review is available if, but only if, the

---

[3] The *Cox* petitioners adopt (Pet. 8-10) the arguments in the petition for a writ of certiorari in *Dalmazzi* and state (Pet. 2) that their claims "rise and fall with *Dalmazzi*." Unless otherwise noted, references to "Pet." refer to the petition in *Dalmazzi*.

CAAF decides a case on its merits * * * . [I]f the [CAAF] does not grant a petition for review, and thus does not decide a case on its merits, the Supreme Court has no jurisdiction to review that inaction by way of certiorari." Stephen M. Shapiro et al., *Supreme Court Practice* 129 (10th ed. 2013).

Petitioners assert (Pet. 1 & n.1) that this Court has jurisdiction because the CAAF initially "granted * * * petition[s] for review under [S]ection 867(a)(3)," 28 U.S.C. 1259(3), even though it later vacated its orders granting review and denied the petitions without addressing petitioners' claims on the merits. But petitioners cite no authority supporting their assertion that Section 1259(3) confers jurisdiction in these circumstances, and their argument is inconsistent with 10 U.S.C. 867a(a). That provision expressly limits the Court's jurisdiction under Section 1259 by specifying that the Court "may not review by a writ of certiorari under this section any action of the [CAAF] in refusing to grant a petition for review." *Ibid.* That limitation applies here because the CAAF decisions that petitioners ask this Court to review are orders that "denied," *i.e.*, refused to grant, their petitions for review. Pet. App. 7a; *Cox* Pet. App. 11a, 14a, 51a, 54a, 67a, 78a.

2. Even if this Court had jurisdiction, the CAAF's discretionary decisions denying review would not warrant certiorari.

a. Petitioners contend (Pet. 10-12) that the CAAF erred in describing its denial of review in *Dalmazzi* as a matter of "mootness." As the context makes clear, however, the CAAF's statement that the case was "moot as to th[e] issues" on which it had granted review did not reflect a statement that the case was moot

in the Article III sense, but rather reflected the CAAF's conclusion that the case did not present the relevant issues in a concrete context. Pet. App. 7a; see *Black's Law Dictionary* 1161 (10th ed. 2014) ("moot, adj. * * * 2. Having no practical significance; hypothetical or academic"). The CAAF explained that Dalmazzi sought to challenge an officer's simultaneous services as a judge on the AFCCA and an appointed judge on the USCMCR, but that the relevant officer "had not yet been appointed a judge of the USCMCR at the time the judgment in [Dalmazzi's] case was released." Pet. App. 7a.

The CAAF's use of colloquial language does not warrant this Court's review, particularly because the CAAF's basic point was correct. "This Court 'reviews judgments, not statements in opinions.'" *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (citation omitted). There is no reason for this Court to consider whether the CAAF made any terminological error in explaining its well-founded discretionary decision to deny review.

b. Petitioners also argue (Pet. 10-11) that the CAAF erred in concluding that the questions they sought to raise were not properly presented. They are mistaken.

Petitioners principally contend (Pet. 11; *Cox* Pet. 9-10) that the judges on their panels violated 10 U.S.C. 973(b)(2)'s prohibition on serving in certain "civil office[s]" even before the President appointed them to the USCMCR because the judges "exercise[d] the functions" of a USCMCR judge before that date. 10 U.S.C. 973(b)(2). It is true that the relevant judges served on the USCMCR even before their presidential appointments because they had previously been assigned to the USCMCR by the Secretary of Defense.

But petitioners' challenges to the validity of the judges' service on the ACCA and the AFCCA were explicitly based on the judges' *appointment* to the USCMCR by the President, not their previous *assignment* to that court by the Secretary.[4] The CAAF thus did not err in concluding that petitioners' statutory challenges would have been properly presented only if the judges had acted on their cases after being appointed by the President.

Dalmazzi also advances the case-specific argument (Pet. 10-11) that even though the AFCCA issued its judgment in her case before the relevant judge was appointed to the USCMCR, her motion for reconsideration was still pending at the time of the appointment. But, as the CAAF explained, the AFCCA lost jurisdiction over Dalmazzi's case before acting on that motion when Dalmazzi filed a petition for review in the CAAF. Pet. App. 3a. The CAAF thus did not err in focusing on the date of the AFCCA's judgment rather than the pendency of the motion for reconsideration.

c. For the foregoing reasons, the CAAF permissibly declined to grant discretionary review based on its determination that petitioners' claims were not properly presented here. But even if that were incorrect (and even if this Court had jurisdiction), any error would not warrant this Court's review because the issue lacks continuing importance. The CAAF's determination that petitioners' claims were not properly presented rested on the fact that the ACCA and the

---

[4] See, *e.g.*, *Dalmazzi* Pet. C.A. Br. 11 ("[T]he decision of the President, with the advice and consent of the Senate, to *appoint* Judge Mitchell to the USCMCR, where he had previously been merely assigned, created statutory and constitutional impediments to his continued service on the [AFCCA].").

AFCCA decided petitioners' appeals before the relevant judges were appointed to the USCMCR by the President. Although petitioners assert (Pet. 12-13) that a number of other cases are in the same posture, the CAAF's conclusion that cases in that posture do not present the statutory and constitutional claims that petitioners seek to raise will not be relevant going forward because the military judges sitting on the USCMCR have now been appointed by the President with the advice and consent of the Senate. As *Ortiz* illustrates, that means that cases decided by the service courts of criminal appeals in the future will not present the threshold obstacle that prevented the CAAF from reaching the merits here. See 2017 WL 1382241, at *2 (deciding the underlying statutory and constitutional questions because the AFCCA's decision in that case "was issued after the President appointed [a judge on the AFCCA panel] to the USCMCR").

3. Petitioners contend (Pet. 13-18) that, in addition to reviewing the CAAF's reason for denying discretionary review, this Court should also decide their underlying statutory and constitutional challenges in the first instance. But those questions were not addressed below, and these cases thus would not be appropriate vehicles in which to consider them even if the Court had jurisdiction. This Court is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and it ordinarily does not address issues that were not passed upon by the courts below. Petitioners identify no sound reason to depart from that rule here. And petitioners' statutory and constitutional claims would not warrant this Court's review even if they were properly presented: The CAAF correctly rejected those claims in *Ortiz*, and

that decision does not conflict with any decision of this Court or another court of appeals.

a. Petitioners' statutory argument is based on 10 U.S.C. 973(b), which provides that, "[e]xcept as otherwise authorized by law," military officers may not "hold, or exercise the functions of, a civil office" that "requires an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. 973(b)(2)(A)(ii). Petitioners assert (Pet. 4-8) that Section 973(b) bars a military officer from serving on a service court of criminal appeals after being appointed to the USCMCR by the President. That contention fails for four independent reasons: (i) military officers are "authorized by law" to serve as judges on the USCMCR; (ii) the position of USCMCR judge is not a "civil office" under Section 973(b); (iii) an appointment by the President, with the advice and consent of the Senate, is not "require[d]" for a military officer to serve on the USCMCR; and (iv) petitioners would not be entitled to relief even if they were correct that simultaneous service on a service court of criminal appeals and the USCMCR violates Section 973(b) because the statute expressly provides that it shall not "be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties," 10 U.S.C. 973(b)(5).

i. Section 973(b)(2) does not prohibit a military officer from holding a covered civil office if the officer is "authorized by law" to do so. 10 U.S.C. 973(b)(2)(A). Here, the MCA expressly authorizes the Secretary of Defense to assign "appellate military judges" to the USCMCR and requires that "[a]ny judge so assigned shall be a commissioned officer of the armed forces." 10 U.S.C. 950f(b)(2); see *In re Khadr*, 823 F.3d 92, 96

(D.C. Cir. 2016) ("The [MCA] authorizes both military judges and civilians to serve on the [USCMCR]."). By providing that one of the two mechanisms for USCMCR judges to be selected applies only to military officers, Congress made clear that military officers are "authorized by law" to serve on that court. Consistent with that statutory authorization, the overwhelming majority of the USCMCR's judges have been military officers. *Khadr*, 823 F.3d at 96.

Petitioners contend (Pet. 6-7) that the MCA is insufficiently "clear and unambiguous" to provide the necessary "authoriz[ation] by law." But nothing in Section 973(b)(2) imposes or suggests the clear-statement rule petitioners advocate. And even if such clarity were necessary, it would be supplied by the MCA's express requirement that all judges assigned to the USCMCR under Section 950f(b)(2) *must* be military officers, as well as by other provisions of the MCA that plainly contemplate that USCMCR judges may be military officers.[5]

ii. The position of USCMCR judge is not a "civil office" within the meaning of Section 973(b)(2). As the USCMCR has explained, adjudication of violations of the law of war by military commissions is "a classic military function." Pet. App. 24a; see William Winthrop, *Military Law and Precedents* 835 (2d ed. 1920) (noting that "military commissions * * * have invariably been composed of commissioned officers of the

---

[5] See, *e.g.*, 10 U.S.C. 949b(b)(4) (providing that the Secretary of Defense may reassign appellate military judges on the USCMCR to other duties "in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member" if the reassignment is "based on military necessity and * * * is consistent with service rotation regulations").

army"). Service by military officers on the USCMCR is thus consistent with the well-recognized role of military officers in administering the law of war and in no way threatens the "civilian preeminence in government" that Section 973(b)(2) is designed to protect. *Riddle* v. *Warner*, 522 F.2d 882, 884 (9th Cir. 1975); see *id.* at 884-885 (holding that the office of notary public is not a "civil office" because military judge advocates have traditionally served as notaries within the military and because service in that office does not undermine the purposes of Section 973(b)).

Petitioner contends (Pet. 5-6) that any office that may be held by a civilian is a "civil office." But that expansive reading is inconsistent with precedent. See, *e.g.*, *Riddle*, 522 F.2d at 884-885. And it would mean that quintessential military offices, such as appellate military judgeships on the service courts of criminal appeals, are "civil office[s]" merely because civilians may also hold them. See 10 U.S.C. 866(a) (providing that appellate military judges on service courts of appeals may be commissioned officers or civilians).

iii. An additional reason that the prohibition in Section 973(b)(2) does not bar military officers from serving as USCMCR judges is that the office of USCMCR judge does not "require[] an appointment by the President by and with the advice and consent of the Senate." Although the President responded to the D.C. Circuit's decision in *Nashiri* by appointing military officers to the USCMCR with the advice and consent of the Senate, no court has held that such an appointment is required. See *Nashiri*, 791 F.3d at 82-86 (declining to resolve that "question[] of first impression"). Petitioners suggest (Pet. 5) that the government has conceded this issue, but in fact the gov-

ernment has maintained that military officers do not require an appointment to serve as USCMCR judges because USCMCR judges are not principal officers. See *Nashiri*, 791 F.3d at 83 (noting the government's argument that the USCMCR judges are inferior officers because the Secretary of Defense supervises the court and can remove its military judges).

iv. Finally, even if petitioners were correct that Section 973(b) prohibits an officer from serving simultaneously on a service court of criminal appeals and on the USCMCR, petitioners would not be entitled to relief for the reasons identified by the CAAF in *Ortiz*. By its terms, Section 973(b) prohibits military officers from serving in specified civil offices, but "[n]othing in the text suggests that it prohibits" an officer who assumes a prohibited civil office "from carrying out his assigned military duties." *Ortiz*, 2017 WL 1382241, at *3. And Section 973(b)'s savings clause expressly forecloses petitioners' attempt to use that provision to overturn the ACCA and AFCCA decisions in their cases because it provides that "nothing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties." 10 U.S.C. 973(b)(5); see *Ortiz*, 2017 WL 1382241, at *3. The relevant judges on the ACCA and AFCCA decided petitioners' appeals "in furtherance of [their] assigned official duties," and petitioners thus cannot invoke Section 973(b) to challenge the courts' decisions.

b. Petitioners' Appointments Clause claim (Pet. 14-18) also lacks merit. The Appointments Clause provides that the President shall "nominate, and by and with the Advice and Consent of the Senate, shall appoint * * * Officers of the United States," but that

"Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. Art. II, § 2, Cl. 2. The military judges at issue here hold two distinct offices: They are judges on service courts of criminal appeals and they separately serve as judges on the USCMCR. Petitioners do not dispute that the officers were placed in each of those two separate offices in a manner consistent with the Appointments Clause.

Judges on the service courts of criminal appeals "are 'inferior Officers' within the meaning of [the Appointments Clause] by reason of the supervision over their work" by judge advocates general and by the CAAF. *Edmond* v. *United States*, 520 U.S. 651, 666 (1997). This Court has held that, because military judges are "already commissioned officers" and therefore have "already been appointed by the President with the advice and consent of the Senate," the Appointments Clause allows them to be assigned to the service courts of criminal appeals without a "second appointment." *Weiss* v. *United States*, 510 U.S. 163, 170 (1994); see *id.* at 176. Petitioners thus do not and could not contend that the assignment of the judges at issue here to the ACCA and the AFCCA violated the Appointments Clause.

Petitioners assert (Pet. 4, 14-18) that judges on the USCMCR are principal officers. The government disagrees with that premise. See pp. 17-18, *supra*. But in any event, the military judges sitting on the USCMCR have now been appointed to that office in the manner required by the Appointments Clause for principal officers: by the President with the advice and consent of the Senate. See *In re al-Nashiri*, 835

F.3d 110, 116 (D.C. Cir. 2016), petition for cert. pending, No. 16-8966 (filed Jan. 17, 2017). Those appointments "put to rest any Appointments Clause questions regarding the [US]CMCR's military judges," *Nashiri*, 791 F.3d at 86, and petitioners do not appear to contend that there is any Appointments Clause problem with the manner in which the relevant judges were appointed to the USCMCR.[6]

Petitioners' contention is, instead, that it violates the Appointments Clause for a single individual to serve simultaneously as a judge on a service court of criminal appeals (an inferior officer) and as a judge on the USCMCR (according to petitioners, a principal officer). But petitioners cite no authority holding that a single individual may not simultaneously serve as a principal officer and an inferior officer in two separate offices. And, as the CAAF explained in *Ortiz*, petitioners' Appointments Clause arguments erroneously "presume[] that [an officer's] status as a principal officer on the USCMCR somehow carries over to the [court of criminal appeals], and invests him with authority or status not held by ordinary [court of criminal appeals] judges." 2017 WL 1382241, at *4. "That is not the case." *Ibid.* Even if a USCMCR judge were a principal officer when he acted in his capacity as such, "[w]hen [the same individual] sits as an [AF]CCA

---

[6] Petitioners do assert (Pet. 14-15) that the appointment of military officers to the USCMCR raises constitutional questions under the Commander-in-Chief Clause, U.S. Const. Art. II, § 2, Cl. 1. But petitioners acknowledge (Pet. 15 n.8) that "[t]he Questions Presented do not include the Commander-in-Chief claim" because they "ha[ve] no standing" to raise that claim. And in any event, petitioners' Commander-in-Chief Clause argument lacks merit. Cf. *Nashiri*, 791 F.3d at 75, 82 (denying a petition for mandamus raising a similar Commander-in-Chief Clause claim).

judge, he is no different from any other [AF]CCA judge." *Ibid.* The officer's status as a USCMCR judge grants him no additional authority on the AFCCA. *Ibid.* Conversely, the officer's status as an AFCCA judge subjects him to no greater supervision when he acts on the USCMCR. *Ibid.*

Relying on *Nguyen* v. *United States*, 539 U.S. 69 (2003), petitioners contend (Pet. 14) that the Appointments Clause prohibits the service courts of criminal appeals from sitting in "mixed" panels in which some of the judges are principal officers by virtue of their simultaneous appointment to the USCMCR. But that argument rests on petitioners' mistaken premise that a judge's status on the USCMCR somehow carries over to his actions in his separate capacity as a judge on a service court of criminal appeals. And *Nguyen* would not assist petitioners in any event because this Court's decision rested not on the Appointments Clause, but rather on a statute requiring that judges sitting by designation on the courts of appeals be Article III judges. 539 U.S. at 74-77 (citing 28 U.S.C. 292(a)).

Relying on *Myers* v. *United States*, 272 U.S. 52 (1926), petitioners further contend (Pet. 14) that the Appointments Clause prohibits a person serving as a principal officer on the USCMCR from simultaneously serving on a service court of criminal appeals because judges on those courts are subject to the "direct supervisory authority" of officers other than the President. But that argument again rests on the mistaken premise that a person who is a principal officer on the USCMCR is also a principal officer when acting in a different capacity on a service court of criminal appeals. And in any event, petitioners cite no authority to support their assertion that a principal officer may

not perform duties subject to the supervision of other officers. In the portion of *Myers* on which petitioners rely, the Court explained that Congress may not interfere with the President's power to remove principal officers; it did not hold that principal officers may not be subject to the "direct supervisory authority" of officials other than the President when they are serving in another capacity. 272 U.S. at 126-128; cf. *Freytag* v. *Commissioner*, 501 U.S. 868, 882 (1991) (noting that the inferior officers at issue in that case "on occasion perform[ed] duties that may be performed by an employee not subject to the Appointments Clause").

4. The appellant in *Ortiz* has sought and obtained an extension of time within which to file a petition for a writ of certiorari to and including June 9, 2017. See *Ortiz* v. *United States*, No. 16A1034 (filed Apr. 21, 2017). The forthcoming petition will presumably raise the same underlying statutory and constitutional claims that petitioners seek to raise here, but without the threshold jurisdictional obstacle identified above and in a case in which the CAAF passed upon the relevant claims. In the government's view, those claims do not warrant this Court's review even in a case in which they are properly presented. But in any event, there is no need to delay the Court's consideration of these petitions until the petition in *Ortiz* is fully briefed. The Court lacks jurisdiction in these cases. And even setting aside that jurisdictional obstacle, the CAAF's decision to deny review on threshold grounds means that petitioners would not be entitled to relief even if this Court granted review in *Ortiz* and adopted their position on the underlying statutory and constitutional issues.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
DANA J. BOENTE
Acting Assistant Attorney General
JOSEPH F. PALMER
DANIELLE S. TARIN
Attorneys

MAY 2017